

TOWN OF KITTERY, MAINE
BOARD OF APPEALS

APPROVED
September 25, 2012

Members present: Vern Gardner, Craig Wilson, Brian Boyle, Niles Pinkham

Members absent: Brett Costa

Staff: Heather Ross, Assistant Code Enforcement Officer

The meeting was called to order at 7:08 p.m.

Pledge to the Flag

Chairman Gardner advised the applicants of the minimum number of members present and asked if any applicants present wished to postpone their review before the Board.

There were none.

Brian Boyle noted he resides on Cutts Road. Mr. Wilson noted he and Mr. Harris sat on the Planning Board together. Mr. Pinkham noted he installed Mr. Harris' septic system. None of the members felt their decisions would be biased or compromised in reviewing Mr. Harris' requests. There were no objections from the applicant or members in the audience..

ITEM 1 – Robert D. Harris requesting an administrative appeal to the terms of Title 16.6.5.10 in order to receive a building permit and continue construction on property located at 4 Gee Road, Map 65 Lot 1G, zoned Rural Residential in the Shoreland Zone.

Brian Boyle noted he resides on Cutts Road which is near Gee Road. Mr. Wilson noted he and Mrs. Harris sat on the Planning Board together. Mr. Pinkham noted he installed Mr. Harris' septic system. None of the members felt their decisions would be biased or compromised in reviewing Mr. Harris' requests. There were no objections from the applicant or members in the audience.

Patrick Bedard, Esq., represented Mr. Harris in his 2008 appeal. Mr. Bedard stated other than connecting to the Town water and sewer, the work was completed within one year. Due to the economic conditions, completion has been delayed. Mr. Bedard stated completion required is plumbing, heating, insulation, sheetrock and paint. The appeal is based on what 'substantial completion' is. The applicant has built a structure in compliance with the 2008 appeal and it is substantially completed, based on that appeal.

There was no public comment. The CEO provided:

1. This is a nonconforming lot with a nonconforming structure located in the Rural Residential and Shoreland zones (the zoning map has been changed since the 2008 appeal and the lot is now located within the Shoreland zone).
2. The applicant appeared before the Board in 2008 and received approval to place a house on the lot, less than the required setbacks from the wetlands and front and side property lines.
3. Mr. Harris applied for a building permit to construct a garage in the location the Board had approved for the house. The permit was issued August 25, 2008.
4. The structure was constructed. There have been no rough inspections, and no building permit was pulled for the house.

5. In August 2012 Mr. Harris applied for a building permit to complete construction on the structure, to insulate, sheetrock, trim, flooring and plumbing. The application was denied on August 9, 2012. Title 16.6.5.10.a states:
Approvals granted under the provisions of this chapter expire if work or change in use involved is not commenced within six months of the date on which approval is granted, or if the work or change in use is not substantially completed within one year of the date on which such approval is granted, unless as otherwise as provided for in the approval decision.
6. It has been more than four years and the structure is not substantially complete. As used in the past, substantial completion means there has been sufficient construction to receive a temporary certificate of occupancy.

Mr. Wilson asked the CEO if the structure they are reviewing was issued a permit as a garage and, if so, is it substantially complete for a garage. Ms. Ross said it was. What does the applicant need to do in order to make the garage a dwelling unit? Ms. Ross stated the applicant would need to apply for a permit as it is an existing space. If the applicant were to expand the structure he would need to go through the Planning Board as it is in the Shoreland zone. Mr. Wilson summarized that it appears his permit for a garage, as it is now, is substantially complete. Mr. Gardner concurred. Mr. Pinkham noted he has been inside and it appears complete as a garage.

Mr. Pinkham moved to grant to Robert D. Harris an administrative appeal to the terms of Title 16.6.5.10 in order to receive a building permit and continue construction on property located at 4 Gee Road, Map 65 Lot 1G, zoned Rural Residential in the Shoreland Zone.

Mr. Boyle seconded

Motion carries unanimously by all members present

Findings of Fact:

1. Attorney Patrick Bedard represented Robert D. Harris in the appeal of the CEO's decision
2. The CEO's denial of the appeal was based on the structure not being substantially complete one year after the August 25, 2008 permit was issued.
3. There was testimony that plumbing, electrical, heating, flooring, trim and finish in the structure remain to be completed.
4. It was reported that over \$88,000 had been expended to date with approximately \$37,000 remaining to complete, representing over two-thirds of total costs completed.
5. There was no public comment.
6. This is a nonconforming lot with a nonconforming structure located in the Rural Residential and Shoreland zones (the zoning map has been changed since the 2008 appeal and the lot is now located within the Shoreland zone).
7. The applicant appeared before the Board in 2008 and received approval to place a house on the lot, less than the required setbacks from the wetlands, front and side property lines.
8. The Applicant applied for a building permit to construct a garage in the location the Board had approved for the house. The permit was issued August 25, 2008.
9. The CEO stated there is no definition for 'substantial completion' in the ordinance, but that she uses that level of completeness as used for a temporary certificate of occupancy. It was her opinion this structure was not substantially complete.
10. The CEO stated the structure, as a garage, is substantially complete.

Mr. Boyle moved to accept the Findings as read
Mr. Pinkham seconded
Motion carries unanimously by all members present

Conclusion:

The Board has the authority under Title 16.1.5.2.F.2 to hear this appeal. The Board of Appeals reviewed the original permit, found it is a garage, and found the garage substantially complete, and the structure is in compliance. The Board vacated the decision of the CEO.

Mr. Pinkham moved to accept the Conclusion as read
Mr. Boyle seconded
Motion carries unanimously by all members present

Chairman Gardner advised this is not the issuance of a building permit, and this decision may be appealed to Superior Court within 45 days.

Mr. Bedard asked that the second appeal by Mr. Harris be withdrawn.

ITEM 2 - Robert D. Harris requesting a miscellaneous variation to the terms of Title 16.6.5.10 in order to continue construction on property located at 4 Gee Road, Map 5 Lot 1G, zoned Rural Residential in the Shoreland Zone.
This appeal was withdrawn by the applicant.

ITEM 3 – Inhabitants of Kittery requesting a miscellaneous variation request to the terms of Title 16.8.10.3.C in order to receive approval to replace an existing sign, located at 120 Rogers Road, Map 14 Lot 91, zoned Urban Residential.

Kyle Cook, representing the Kittery Community Center, stated the proposed sign is replacing an existing freestanding sign in the same location and the same size.

There was no public comment. The CEO provided:

1. This is a conforming lot with conforming structures located in the Urban Residential zone.
2. The Town of Kittery Recreation Department is requesting permission to remove an existing freestanding sign, and install a new freestanding sign in the same location.
3. Title 16.8.10.3.C requires signs to be set back 33 feet from the centerline of the road. The current sign is 21 feet from the center of the road.
4. The new sign proposes to be no more non-conforming than the existing sign in size and location.

Chairman Gardner asked why the sign cannot be placed in a conforming location. Mr. Cook stated if it is moved 33 feet from the center line it will be behind a baseball fence and at a lower elevation, making it difficult to see. The sign will be a reader board for the Kittery Community Center, the same as the current sign, with the same dimensions. The CEO stated any conforming location would make the sign difficult to see. Mr. Wilson noted Title 16.8.10.12 provides for lawfully existing, nonconforming signs. Discussion followed regarding conformity and the allowance for continuance of nonconformity in the ordinance.

Mr. Pinkham moved to grant to the Inhabitants of Kittery a miscellaneous variation to the terms of Title 16.8.10.3.C in order to receive approval to replace an existing sign, located at 120 Rogers Road, Map 14 Lot 91, in the Urban Residential zone.

Mr. Boyle seconded

Motion carries unanimously by all members present

Findings of Fact:

1. This is a conforming lot with conforming structures located in the Urban Residential zone.
2. The Town of Kittery Recreation Department is requesting permission to remove an existing freestanding sign, and install a new freestanding sign in the same location.
3. Title 16.8.10.3.C requires signs to be set back 33 feet from the centerline of the road. The existing sign is 21 feet from the center of the road.
4. The proposed sign will be no more non-conforming than the existing sign in size and location.
5. There was no public comment.

Mr. Boyle moved to accept the Findings as read

Mr. Pinkham seconded

Motion carries unanimously by all members present

Conclusion:

The Board has the authority under Title 16.1.5.2.F.4, Miscellaneous Variation Request, to hear this item. Title 16.8.10.12.a. gives the Board the authority to grant the placement of a nonconforming sign as it is no more nonconforming in size or location than the existing sign.

Mr. Pinkham moved to accept the Conclusion as read

Mr. Boyle seconded

Motion carries unanimously by all members present

Chairman Gardner advised this is not the issuance of a building permit, and this decision may be appealed to Superior Court within 45 days.

ITEM 4 – Jones Family Trust requesting an administrative appeal to the terms of Title 16.1.6.2.F.2.d, 16.3.2.17.D.2.g and 16.8.15.1.O in order to receive approval from the Code Enforcement office in order to construct a 98+/- sf landing with a 3'x26' gangway leading to one of the existing floats, located in the Kittery Point Village and Shoreland zones.

Zachary Taylor, Pickering Marine, summarized the request. He noted that federal and state permit applications had been filed for the project. These agencies review the environmental and navigational impacts as well as the required needs of the activity proposed. There can be no development without state and federal approval. Mr. Taylor stated this is not a new pier, ramp or float, but an expansion of an existing structure to provide safe access to and from existing structures. An alternative access to the existing floats proposed by the CEO would also require the same level of development as that proposed by the Applicant. In response to Title 16.3.2.17.D.2.g, he noted there is no vegetated surface, but ledge.

There was no public comment. The CEO provided:

1. This is a nonconforming lot with nonconforming structures located in the Kittery Point Village and Shoreland zones.
2. Current ordinance requires review by the Code and Planning offices prior to submittal to the Port Authority for a public hearing. The application was denied at the administrative level.
3. Mr. Taylor has proposed to construct a 98± square foot landing, with a 3'x36' gangway leading to one of the existing floats on the property.
4. It appears, from the plan, that the proposed construction is another pier, a new ramp, and a reconstructed float.
5. Title 16.1.6.2.F.2.D states: *The Port Authority may approve, for convenience of access to a pier from land upland of the mean high water line or the edge of a coastal wetland, an extension of the pier that is the shortest practicable extension at its nominal height and width. All other structures upland of, and abutting or built on or over a structure extending into a water body beyond the mean high water line or the edge of a coastal wetland require Planning approval. Only one pier, ramp and float structure is permitted on any noncommercial or nonindustrial lot.* This property, as verified by the Chairman of the Port Authority, is a residential lot.
6. The definition of a pier is: *a structure built out into the water generally with piles for use as a landing place.*
7. The property currently has a ramp-like structure that leads from the ledge at the top of the property onto the existing pier. It is the determination of the Code Office that the proposal is an additional pier/ramp/float system since it does not connect with the existing pier.
8. Title 16.8.15.1.G states: *the facility must be a water-dependent use and no larger than necessary to carry on the activity and must be consisted with existing conditions, use and character of the area.* This proposal is for a water-dependent use that has been determined to be larger than necessary to carry on the activity.
9. Title 16.8.15.1.O states: *Only one pier, ramp and float structure is permitted on any noncommercial or nonindustrial lot.* This proposal is for a second pier, ramp and float structure.

Mr. Pinkham noted the existing wharf is too low as originally built, requiring another means of access, and believes the proposed ramp is a necessity. The CEO described her proposed alternative, and explained the difference between the applicant's proposal. Mr. Taylor stated the proposed landing will be connected to the existing substructure. Chairman Gardner asked what the existing shacks are used for. The applicant [unidentified] stated they were used for lobster processing, but are now used for storage. Mr. Wilson opinioned the proposal does not appear to overburden the residential use of the property and by his understanding, the structures will be connected. Chairman Gardner believes there are alternatives to what was proposed. Mr. Taylor explained the proposal was designed to reduce the steep incline to the water, and noted the state and federal review authorities have supported this design. Mr. Wilson stated Board members are not engineers and should not be proposing alternatives, but whether they will uphold the decision of the Code Enforcement Officer.

Mr. Boyle moved to grant an administrative appeal to the Jones Family Trust to the terms of Title 16.1.6.F.2.D, 16.3.2.17.d.2.g and 16.8.15.1.G and 16.8.15.1.O in order to receive approval from the Code Enforcement office in order to construct a 98+/- sf landing with a 3'x26' gangway leading to one of the existing floats, May 44 Lot 65, located in the Kittery Point Village and Shoreland zones.

Mr. Pinkham seconded

Motion to grant the administrative appeal failed with 3 in favor and one opposed (Gardner)

Findings of Fact:

1. Zachary Taylor of Riverside Pickering Marine, representing the Jones Family Trust, appealed the decision of the CEO not to grant a 98± square foot landing and a 3'x36' gangway leading to existing floats.
2. Currently there is only ladder access (8-10 foot climb) to the pier. Applicant's proposal was to allow for safe use by children and older residents of the property.
3. The CEO determined the proposal was larger than necessary for a water dependent use. The applicant felt the Port Authority and other regulatory agencies would make that decision as part of their review.
4. Title 16.1.6.2 F.2.D and 16.8.1.5.1.O note only one pier, ramp and float structure is permitted at a residential property. The CEO determined the proposal was a second pier, ramp and float system as the expansion was not physically connected to the existing gangway.
5. This is a nonconforming lot with nonconforming structures located in the Kittery Point Village and Shoreland zones.
6. The applicant noted they received permission from the abutter for a reduced setback.
7. Board members discussed alternatives that could obviate the second pier; however, there were other issues (wave action/tidal surge) that could impact those suggestions.

Mr. Wilson moved to accept the Findings as read

Mr. Gardner seconded

Mr. Wilson reminded Board members that the Findings are the record of the decision.

Motion is accepted with 3 in favor; 0 against; 1 abstention (Pinkham)

Conclusion:

The Board has the authority under Title 16.1.5.2.F.2, Administrative Appeal, to hear this item. The Board upheld the decision of the CEO that this was a second pier not permissible under Title 16.1.6.2.F.2.D and Title 16.8.1.5.1.O.

Mr. Boyle moved to accept the Conclusion as read

Mr. Wilson seconded

Motion is accepted with 3 in favor; 0 against; 1 abstention (Pinkham)

Chairman Gardner advised that this decision may be appealed to Superior Court within 45 days.

Mr. Taylor asked if all four issues were upheld under the appeal. Chairman Gardner said they were. The CEO stated the fourth issue regarding the non-vegetated coverage issue was unclear earlier, but was adequately explained at the hearing.

Minutes

The April 24, 2012 minutes were unanimously accepted as corrected

The July 24, 2012 minutes were unanimously accepted as amended

Mr. Pinkham moved to adjourn

Mr. Gardner seconded

Motion carries unanimously by all members present

The Kittery BOA meeting of September 25, 2012 adjourned at 8:36 p.m.
Submitted by Jan Fisk, October 2, 2012